Supreme Court of the United States

OCTOBER TERM, 1945.

No. 156

E. M. GEORGE-HOWARD AND WOODDY SWEARINGEN, PETITIONERS,

VS.

FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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FEDERAL DEPOSIT INSURANCE CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

E. M. George-Howard and Wooddy Swearingen, petitioners in the above entitled case, respectfully pray the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review an opinion and judgment of the Circuit Court of Appeals rendered herein on February 18, 1946 (R. 88-98), which reversed the judgment entered by the United States District Court for the Western District of Missouri on August 16, 1944 (R. 46).

OPINION OF THE COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit, in this case, is reported in 153 F. 2d at page 591 and appears on pages 88 to 98 of the transcript of the record filed herewith.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This suit was brought by Respondent in the District Court of the United States for the Western District of Missouri to recover the sum of $6,877.19 placed with Petitioner, Wooddy Swearingen, under an escrow agreement (R. 22 and 66) between Respondent and Petitioner E. M. George-Howard, then the sole stockholder of the Nevada Trust Company, a Missouri banking institution of Nevada, Vernon County, Missouri. The sum, lifted out of the assets of the Trust Company under the escrow agreement and under an order of the Circuit Court of Vernon County, Missouri, measures the interest claimed by Respondent to have been due on the principal of its payments, totalling $120,948.14, paid to the insured depositors of the Trust Company (R. 15 and 59). The time for which interest is claimed ran from the closing of the Trust Company, December 2, 1937, until Respondent was from time to time and finally reimbursed out of the Assets. The interest is figured at six per cent, but the basis for that rate is not shown. Respondent took written assignments, of the claims of the depositors (R. 13 and 57); made its payments, and claimed the escrow fund in virtue of its assignments and of allowances of claims for reimbursement by the Finance Commissioner and of the approval and directing payment thereof by the Circuit Court. All the claims

for reimbursement of moneys paid the Depositors were timely presented, under the statute of Missouri (Sec. 7928, R. S. Mo., 1939) and were duly paid. In none of the claims so presented, however, did Respondent claim any interest, whatsoever. The claim for interest, aggregating the amount of the Escrow Fund, was presented to the Finance Commissioner for allowance February 26, 1941, long after the end of the time, May 6, 1938, fixed under the Missouri Statute, *supra*, for presenting claims. The interest claim was rejected by the Commissioner; but no suit was brought thereon within six months thereafter as required by Sec. 7932, R. S. Mo., 1939, providing for suits on rejected claims (See R. 81-84) (Also R. 26, 27 and 89).

Respondent, to invoke the jurisdiction of the U. S. District Court, pleaded that it was organized under the Act of Congress, Sec. 264, Title 12, U. S. C.; that under subsection (j) fourth, thereof, "The cause is deemed to arise under the laws of the United States" (R. 12) "And (by a later amendment) (R. 42) the Federal Government owns more than one-half of the capital stock of said corporation."

As part of its cause of action, Respondent set out in its amended complaint, Title 12—Sec. 264 (1) (6) and (7), providing for payment of deposits, "whenever an insured bank shall have been closed on account of inability to pay the demands of its depositors"; but prohibiting payment in the case of a state bank, "until the right of the corporation to be subrogated to the rights of depositors on the same basis as provided in the case of a closed national bank under this section, shall have been recognized either by express provision of state law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors, or any other effective method. * * * Provided, that the rights of depositors and other creditors of any state bank shall be determined in accordance with the applicable provisions of state law" (R. 14).

Petitioner's amended answer (R. 29-34) pleaded that subsection (j), Fourth, Title 12, Sec. 264, U. S. C. A., was unconstitutional as invading the judicial power of the Federal Courts in violation of Sec. 2 of Article III of the Constitution of the United States; that the cause attempted to be stated was for interest alone, and therefore not contemplated as a basis for jurisdiction of the District Court, under Title 28, Sec. 41 (R. 35); that the special statutes of limitation, Sec. 7928 and Sec. 7932, R. S. Mo., 1939, barred the cause of action; that to hear the claim, would be to allow respondent to split its cause of action, to the vexation of both Petitioners and the Courts; and further, that the Trust Company was closed, not "on account of inability to meet the demands of its depositors," as required by the incorporating act of Respondent, *supra;* but that it was closed by the Finance Commissioner of Missouri at the wrongful instigation of Respondent, because of "Respondent's dissatisfaction with the management of the bank"; that there was never any question of its solvency.

Neither did Respondent plead that the bank was unable to pay the depositors; nor does the record show that the Nevada Trust Company was closed for any other reason than the demand of Respondent on the Missouri Finance Commissioner, because of Respondent's dissatisfaction with the management (R. 13, 31 and 64-65).

The evidence offered did not sustain respondent's averment that the Federal Government owns more than one-half of the capital stock of the Federal Deposit Insurance Corporation. The affidavit of E. F. Downey, Secretary (R. 76), merely gives the amount of stock respectively paid for and issued to the Government and to the several Federal Reserve Banks. What the subscriptions of the various Federal Reserve Banks were, which make up their parts of the capital stock are not revealed.

Their subscriptions were required to be equal to one-half of their undisclosed surpluses on January 1, 1933.

One-half of their subscriptions was required to be paid at the time of subscribing; the other half was left subject to the call of the directorate of Respondent. How the whole amount subscribed for by the banks compares with the one hundred and fifty million dollars appropriated as the Government's share, is not shown, and cannot be known without knowing what the surpluses of the banks were on January 1, 1933. Sec. 264 (d), Title 12, U. S. C. A.

Since the parts of the subscriptions subject to call were enforceable obligations, they were a part of the capital stock, not owned by the Federal Government (Title 12, Sec. 264 (d), U. S. C. A.). The amount cannot be learned from the record. See 14 Corpus Juris, p. 383.

The District Court held (1) that the controversy did not arise under the constitution nor laws of the United States and the court therefore had no jurisdiction of the proceeding; and (2) that if it did have jurisdiction, the court, out of comity ought not to exercise it, for the reason that the claim of respondent against the assets of the Nevada Trust Company (together with all incidents of that claim) had been theretofore presented to the State Circuit Court of Vernon County, Missouri, and should be maintained only in that Court (R. 41).

The Circuit Court of Appeals for the Eighth District to which the case was appealed by Respondent reversed the District Court on both the foregoing grounds and gave Respondent judgment for the fund in Escrow.

We submit that the Circuit Court of Appeals has erroneously determined, either expressly or by necessary implication, questions of pleading, of jurisdiction and of fundamental law involved in the case, which are of such general importance as to be invested with a public interest; that the ruling is in conflict with opinions of other Fed-

eral Courts and of the Supreme Court; and that the ruling involves questions not heretofore determined, yet which are of such vitality to the harmony of the law, as to address themselves to the supervisory jurisdiction of the Supreme Court.

BASIS OF JURISDICTION.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a), and under Title 28, Sec. 377, U. S. C. A., and under Rule 38 of the Revised Rules of the Supreme Court of the United States.

The opinion and judgment of the Circuit Court of Appeals herein were filed on February 18, 1946 (R. 88-98). The Petitioners filed their Petition for a Rehearing on March 25, 1946 (R. 101-109) the time for filing having been extended to that date by order of the Circuit Court of Appeals made March 4, 1946 (R. 99), which petition was denied April 2, 1946 (R. 111). On April 11, 1946, the Circuit Court of Appeals stayed the Mandate for sixty days pending Petitioner's application for writ of Certiorari (R. 111).

QUESTIONS PRESENTED.

I.

Did not the Supreme Court of the United States, instead of the Circuit Court of Appeals, have jurisdiction of any appeal which Respondent might have taken from the United States District Court; and should not the opinion of the Circuit Court of Appeals, therefore, be quashed, under Sec. 349a, Title 28, U. S. C. A.?

II.

Does not Respondent's amended complaint (R. 12) together with the amendment (R. 44) fail to meet the requirement of Rule 8, (a), (1) of the Rules of Civil procedure for the District Courts of the United States, which provides:

> "A pleading which sets forth a claim for relief * * * shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends."

Paragraph I of the amended complaint which attempts to state the jurisdictional basis provides:

> "That it is a corporation duly organized and existing under and by virtue of an act of congress of the United States, known as Section 264, Title 12, U. S. C., with its principal place of business in Washington in the District of Columbia (R. 44), and the Federal Government owns more than one-half of the capital stock of the corporation. Under sub-section (j) of the statute aforesaid, the cause is deemed to arise under the laws of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand (3,000) dollars."

(a) Except for the plea of the jurisdictional amount in the foregoing paragraph, has not respondent merely identified itself as a corporate entity without respect to the jurisdiction of the District Court; and merely stated what the Congress has said with respect to its cause of action; instead of having pleaded in positive and unequivocal terms that the cause of action arises under the laws of the United States.

(b) Is it not a judicial question whether Respondent's claim arises under the laws of the United States; and is not the congressional declaration of sub-section

(j), fourth, *supra*, an unwarranted invasion of the judicial power, as held by the District Court (R. 37-39); and void? (Sec. 2, Art. III, U. S. Constitution).

(c) Has not the Circuit Court of Appeals, wrongfully held that sub-section (j), fourth, *supra*, fixes the jurisdiction in this case; and thereby wrongfully admitted the authority of Congress to determine this judicial question for the Courts? The Court, quoting the Provision said (R. 90):

> "'All Suits of a civil nature at common law or in equity to which the corporation (in its own capacity) shall be a party, shall be deemed to arise under the laws of the United States.' This special provision reasonably can only mean that all suits to which the corporation is a party in its own capacity must legally be regarded as arising under the laws of the United States, within the jurisdiction granted to the Federal District Courts by Sec. 24 (1) (a) of the Judicial Code, 28 U. S. C. A., Sec. 41 (1) (a)."

(d) Yet, if sub-section (j), *supra*, is of no effect in fixing the jurisdiction of the case, as indicated in note 1 (R. 90) of the opinion of the Circuit Court of Appeals, then is not Respondent's amended complaint simply bereft of any affirmative showing of jurisdiction in the District Court, as required by Rule 8 (a) (1); and did not the Court disregard the Rule in locating the jurisdiction, in Title 28, Secs. 41 and 42, U. S. C. A., which Respondent had not pleaded? (R. 90-91.)

III.

Has not the Circuit Court of Appeals misunderstood Sec. 42, Title 28, U. S. C. A., in further resting the jurisdiction on Sec. 41 (1) (a) Title 28, U. S. C. A.,

in virtue of the rule in the case of *Osborn* v. *Bank of the U. S.*, 9 Wheat. 738, 22 U. S. 738, 6 L. Ed. 204? (R. 90-91.)

(a) Does not Sec. 42, Title 28, U. S. C. A., altogether abolish the rule of the Osborn case, except as to Federal corporations in which the incorporating Statute, itself, shows that the government of the United States owns more than one-half of the capital stock, and that the corporation is an agency of the United States?

(b) Has not the Circuit Court of Appeals mis-read the case of *Gully* v. *First National Bank of Meridian*, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed. 70; and has not that case held that the mere fact of federal incorporation is not longer available as a basis of jurisdiction of the District Courts; but rather the nature of the cause of action itself must involve some provision of the constitution or law of the United States, aside from the Federal law of incorporation?

IV.

Has not Respondent, in merely pleading that the Federal Government owns more than one-half of its capital stock, instead of pleading the facts from which the ownership may be determined, pleaded only a conclusion of law, instead of an ultimate fact?, and is not the pleading as such condemned, by *Kvos* v. *Associated Press*, 299 U. S. 629, l. c. 279, and by *McNutt* v. *General Motors Acceptance Corporation*, 298 U. S. 178, l. c. 181?

(a) Did the Supreme Court in making Rule 8 (1) requiring that a complaint should "contain a short and plain statement of the grounds upon which the (district) court's jurisdiction depends," intend to abandon the all but universal requirement that a complaint should plead the ultimate facts, instead of legal conclusions?

(b) Does not the record fail to sustain the holding of the Circuit Court of Appeals that:

> "The Federal Deposit Insurance Corporation is a Federal Corporation and is one in which the Government owns more than one half of the capital stock" (R. 90),

there being no evidence of ownership except the affidavit of the Secretary, E. F. Downey (R. 76), which merely shows the number of shares issued to the Government and the aggregate number issued to the Federal Reserve Banks, without showing how many shares the banks had subscribed for?

V.

Although the Congress declared in the act of incorporation that Respondent's law suits should "be deemed to arise under the laws of the United States," does not the proviso of the incorporating act, Title 12, Sec. 264 (1) (7), withdraw Respondent's causes of action arising out of the assets of state banks in liquidation, from the District Courts, and refer them to the jurisdiction of the States, as to Courts, procedure and substantive law? The proviso is:

> "Provided that the rights of depositors and other creditors of any State bank shall be determined in accordance with the applicable provisions of State law."

VI.

Were not the assets which were placed in the hands of Petitioner Wooddy Swearingen, still unadministered, notwithstanding the order of the State Circuit Court (R. 68), and the escrow agreement (R. 62) and therefore subject to the jurisdiction of the State Circuit Court?

(a) Did the State Court have authority under the Missouri Statutes, Art. 1, Ch. 39, R. S. Mo., 1939, to divest itself of jurisdiction of any of the assets before final liquidation and distribution?

(b) Is it not the assets of a bank in liquidation which are under the control of the Missouri State Circuit Court, under the Missouri law, *supra,* and under the proviso of Title 12, Sec. 264 (1) (7), and are not all claims irrespective of their nature, whether for interest or otherwise, which go against the assets, within that jurisdiction?

(c) Should not the Circuit Court of Appeals, therefore, have given effect to the rule of comity, as did the District Court, and have affirmed the dismissal by the District Court?

VII.

Since the incorporating act, Title 12, Sec. 264 (1) (6), U. S. C. A., limits the obligation of Respondent to pay to depositors the insured deposits in a bank which "has been closed on account of inability to meet the demands of its depositors," and since the Respondent's amended complaint and the evidence shows (R. 12 and 64) that the Nevada Trust Company was closed, not on account of any failing condition, but at the wrongful instigation of Respondent, should Respondent be allowed to take advantage of its own wrong and collect interest, as for money withheld?

(a) Should not this case be distinguished from the case of *Federal Deposit Insurance Corporation* v. *Farmers Bank of Newtown,* 180 S. W. 2d 532 (Mo. App.), relied on by the Circuit Court of Appeals (R. 95), for in that case no question was raised with respect to that bank's having been lawfully closed?

(b) Is not the opinion of the Court of Appeals in *FDIC* v. *Farmers Bank of Newtown*, 180 S. W. 2d 532, relied on by the Circuit Court of Appeals as an expression of the Missouri law governing the disposition of the fund in escrow, in conflict with the opinion of the Supreme Court of Missouri in *State ex rel. Moberly* v. *Sevier, Judge*, 337 Mo. 1174, 88 S. W. 2d 254, holding that Art. 1, Ch. 39, R. S. Mo., 1939, furnishes a complete and exclusive remedy for the disposition of claims against the assets of banks in liquidation?

VIII.

In excluding interest and costs in fixing the jurisdictional amount of a claim in the United States District Court, does not Sec. 41 (1), Title 28, U. S. C. A., exclude any claim for interest alone, where the interest does not arise by contract but only as an incident to the principal as a penalty for its non-payment, and where the principal upon which the interest is claimed to arise is shown by the complaint to have been reduced to judgment and paid?

IX.

Has not the opinion of the Circuit Court of Appeals violated those principles and rules of procedure which do not allow a Respondent to recover its principal in a State Court, and thereafter to recover interest thereon in the Federal Court to the vexation of both the Court and defendants as held in

Melvin v. *Hoffman*, 290 Mo. 464, l. c. 492, 235 S. W. 107, and cases therein cited;

Stewart v. *Barnes, Exc.*, 153 U. S. 456;

Pacific Railroad v. *United States*, 158 U. S. 118;

and do not those cases deny the right of Respondent to recover in this suit, interest which was a mere incident to

the principal allowed and recovered in the liquidation proceedings on approval of the State Circuit Court?

REASONS RELIED ON FOR ALLOWING THE WRIT.

The affairs of respondent, Federal Deposit Insurance Corporation, are so extensive, yet its organization is so comparatively recent, and the body of the law, therefore, specially affecting it has received such little construction, that any opinion of the Federal courts defining its rights in any particular, are likely to be of importance to the public; likewise, the rules of procedure for the United States District Courts are of such extensive effect, that any construction of them with respect to the jurisdiction of the District Courts is also of much general importance. Both are involved in this application for certiorari.

I.

The First Question Presented—Jurisdiction.

The District Court dismissed the suit because it considered that the court had no jurisdiction of the case. It thereby rejected the plea of respondent's amended complaint that under Sub-section (j) fourth of Sec. 264, Title 12, U. S. C. A., that

> "The cause is deemed to arise under the laws of the United States."

as being without efficacy, holding that the Congress was without power to determine a judicial question for the courts. The holding is in effect that Sub-section (j) *supra* is unconstitutional.

Title 28, Sec. 349a U. S. C. A., provides:

> "In any suit or proceeding in any court of the United States to which the United States, or any

agency thereof, * * * is a party, and in which the decision is against the constitutionality of any Act of Congress, an appeal may be taken directly to the Supreme Court of the United States by the United States or any other party to such suit" * * *.

If the Federal Incorporating Act has made of respondent an agency of the United States, then it appears that the appeal from the District Court should have been taken directly to the Supreme Court instead of the Circuit Court of Appeals; and the opinion of the Circuit Court of Appeals should be quashed for want of jurisdiction.

II.

The Second Question Presented—Defective Complaint.

(a) The first sentence of the paragraph of the Amended Complaint quoted under question II, standing alone, does no more than to identify respondent as a corporate entity, and contributes nothing as a basis for jurisdiction in the District Court. The next sentence stating that the cause is *deemed* to arise under the laws of the United States, is but a statement of what the Congress has said about the cause of action. It is not a statement that the matter in controversy arises under any law of the United States. The Supreme Court has interpreted Rule 8 (a) (1) in submitting "Form 2" for pleading jurisdiction. The form is as follows:

> "The action arises under the Act of ——, ——, Statute ——; U. S. C., Title ——, No. ——, as hereinafter more fully appears."

(b) There can be little question that jurisdiction of respondent's claim addresses itself to the courts; and that the Congress cannot thrust respondent's cases into

the jurisdiction of the Federal courts by a mere declaration that all Respondent's causes of action shall be deemed to arise under the laws of the United States. The Congress can only withhold from or confer the jurisdiction of cases on inferior courts, if those cases otherwise are within the judicial power of the United States. The District Court stated the matter quite clearly (R. 39). Article III, Section 2, of the United States Constitution.

(c) We have set out the holding of the Circuit Court of Appeals, giving its interpretation that Sub-section (j) "must legally be regarded as arising under the laws of the United States." Surely the court has regarded the Congressional declaration as binding upon the courts instead of being invalid, if the statement of the court is not destroyed by Note 1 of the opinion (R. 90). The Circuit Court of Appeals therefore must be in error in upholding Sub-section (j) fourth as constitutional.

(d) If the effect of Note 1 of the opinion of the Circuit Court of Appeals is such as to reject the validity of Sub-section (j), fourth, *supra*, the respondent's amended complaint is without any jurisdictional averment, and the Circuit Court of Appeals should have affirmed the dismissal of the District Court. If a complainant misunderstands the law and pleads a statute that does not confer jurisdiction, then the pleading should fail, else Rule 8 (a) (1) is of little worth; for the court in locating the jurisdiction under a statute not pleaded might as well have done so without any rule at all.

III.

The Third Question Presented—Sec. 42, Title 28, U. S. C. A.

(a) The first sentence of this statute abolished the rule of the case of *Osborn* v. *Bank*, 9 Wheat. 738, 22

U. S. 738, in which it was held that a cause of action of a Federal corporation arose under the laws of the United States by the mere fact of Federal incorporation. The second sentence providing that the Act shall not apply to those Federal corporations wherein the government owns more than one-half of the capital stock, does not restore the rule of the Osborn case to all corporations in which the government may own more than one-half of the capital stock. The exemption of the statute applies only to those corporations in which the acts of incorporation themselves show or provide that the government shall own more than one-half of the capital stock. The Congress must have had in mind a class of corporations which stood as agencies of the United States, and not any and all Federal corporations irrespective of their functions, and of the changing ownership of the evidences of their capital stock; so that today a Federal corporation might have access to the Federal courts, and tomorrow, because of changing ownership of capital stock, it might lose that access. The Statute can serve no governmental purpose by being so interpreted, and such an interpretation must convict the Congress of the merest caprice in enacting the Statute. The courts have not had occasion to pass upon the meaning and purpose of this statute, although some of their opinions have commented on the statute, and stated as a matter of dictum that the rule of the Osborn case was applicable.

Nor does the provision of Title 12, Sec. 264 (j) fourth, U. S. C. A., that respondent "may sue, complain and defend, in any court of law or equity, state or Federal," have any jurisdictional force, against the holding in the case of *Bank of the United States* v. *Deveaux et al.*, 5 Cranch 61, as follows:

"This power, if not incident to a corporation, is conferred by every incorporation act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation in any court which would by law, have cognizance of the cause if brought by individuals.

If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be. * * *

The court then is of the opinion that no right is conferred on the bank by the act of incorporation to sue in the Federal Courts."

(b) We submit that the Circuit Court of Appeals has misunderstood the case of *Gully* v. *First National Bank of Meridian,* 299 U. S. 109, l. c. 112-114, 57 S. Ct. 96, 81 L. Ed. 70 (R. 91). That case is very clear in holding:

"A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends * * * the Federal nature of the right to be established is decisive—not the source of the authority to establish it."

The *Gully case, supra,* is the last expression of the Supreme Court. The rule of the Osborn case is superseded by its rule. See also *Fed. Sav. & Loan Ins. Corp.* v. *Third Nat'l Bank of Nashville,* 60 Fed. Supp. 110.

IV.

The Fourth Question Presented—Ownership of Stock.

The plea of the amended complaint that the government owns more than one-half of the capital stock of respondent is a mere legal conclusion, and as such should be disregarded. The capital stock of a corporation is the property of the corporation.

Georgia R. R. and Banking Co. v. *Wright*, 132 Fed. 912.

Powers v. *Detroit and Grand Haven Railway*, 201 U. S. 543, l. c. 559.

Wright v. *Ga. R. R. and Banking Co.*, 216 U. S. 420.

The ownership of the capital stock or property, of a corporation, of course, is owned by the corporation itself. Therefore, the expression in the Statute, Sec. 42, Title 28, U. S. C. A., with respect to the ownership of more than one-half of the capital stock by the Federal Government must refer to the equitable right in and to the property of the corporation, according to the paper evidences thereof, such as stocks, notes, bonds, grants, which would indicate an investment therein by the Federal government. Since the property of a corporation which makes up its capital stock may not include all the property, such as declared but unpaid dividends and sinking funds, and since the varied properties may be of divergent values, and the evidences of interest therein may be so varied, it is but a conclusion of a pleader to say that one owns more than one-half of the capital stock. The facts lie buried in the conclusion which the pleader imposes upon the court with the facts concealed from the court. The Supreme Court, even under the new rules, including

Rule 8a has held that a complaint must state facts, not conclusions.

> *Kvos, Inc.*, v. *Associated Press*, 299 U. S. 269, l. c. 279.
>
> *McNutt* v. *General Motors Acceptance Corp.*, 298 U. S. 178, l. c. 181.
>
> See also *Fed. S. & L. Ins. Corp.* v. *Third Nat'l Bank*, 60 Fed. Supp. 110, l. c. 117.

The Federal district courts and the circuit courts of appeals have held almost every conceivable way on the question, and we will not presume to submit a list of their cases in view of the foregoing citations from the Supreme Court.

The holding of the Circuit Court of Appeals in this case that,

> "The Federal Deposit Insurance Corporation is a Federal corporation and is one in which the government owns more than one-half of the capital stock" (R. 90).

is without support of the amended complaint, and the evidence of E. F. Downey (R. 76), does not show that the government owns more than one-half of the capital stock; but merely shows that more Class A stock had been issued to the Government than Class B stock to the Federal Reserve Banks, without reference to the amount of stock actually subscribed by the banks, the amount of their *subscriptions* in dollars and cents not being disclosed by the act nor the record.

V.

The Fifth Question Presented—Title 12, Section 264, (1) (7) Proviso.

The foregoing proviso which we have quoted under our Question 5 has withdrawn from the district courts

Respondent's causes of action, which arise out of liquidation proceedings in the case of State banks. They shall be determined in accordance with the applicable provisions of State law. Art. 1, Ch. 39, R. S. Mo., 1939, has furnished a complete and exclusive remedy for the liquidation of State banks. Since the foregoing proviso is without qualification, there is no reason why it does not refer this case to the Missouri law, *supra*, both as to the court, the procedure and the substantive law. Such was the holding of the district court (R. 38).

State ex rel. Moberly v. *Sevier, Judge,* 337 Mo. 1174, 88 S. W. 2d 154, and authorities therein cited.

VI.

The Sixth Question Presented—Jurisdiction of the State Circuit Court.

Under Art. 1, Ch. 39, R. S. Mo., 1939, Liquidation proceedings of a State bank are under the supervision of the Missouri circuit court of the county where the bank is located. That supervision is not by virtue of the common law or equity powers of the court, but is the result of the foregoing statute. The jurisdiction continues until all claims are paid, and the assets are finally distributed. The statute does not give the court authority to divest itself of jurisdiction until the final conclusion of the proceeding. The escrow agreement under which the fund in controversy is being held had the approval of the circuit court (R. 22 and 68), but neither the agreement nor the order of the court completed the liquidation. The claim for interest which was rejected by the finance commissioner, and which is the basis of this suit, was not disposed of, and the assets which went into the escrow fund were not finally distributed. The district court therefore was cor-

rect in holding that if the Federal Court had jurisdiction, it should not exercise it and that as a matter of comity, the claim of respondent properly belonged in the State Circuit Court, and was correct in dismissing the case.

State ex rel. v. *Sevier*, 337 Mo. 1174, 88 S. W. 2d 154, and cases therein cited.

VII.

The Seventh Question Presented—Wrongful Closing of the Bank.

The Nevada Trust Company was not closed because of inability to meet the demands of its depositors. Neither the pleadings nor the record anywhere show that this bank was insolvent nor in any way unable to meet its obligations. But it was closed at the wrongful instigation of respondent because of its dissatisfaction with the management. The evidence is undisputed (R. 65). Since the bank was involuntarily closed, without fault of the management, but at the fault of respondent, respondent ought not to be allowed to take advantage of its own wrong, and collect interest, as for money wrongfully withheld from it although it had a right to collect the deposits themselves, under its assignments. The act of incorporation of respondent, Title 12, Sec. 264 (1) (6), U. S. C. A., limits respondent in the payment of insured deposits to deposits in those banks which have been closed "on account of inability to meet the demands of depositors." If respondent may recover in this case when that condition was not present in the Nevada Trust Company, the respondent will have been given quite a free rein in being high-handed in dealing with insured banks.

Tredegar v. *Seaboard Airline Ry.*, 183 Fed. 289.

Thomas v. *Car Co.*, 149 U. S. 95, 37 L. Ed. 663.

The case of *Federal Deposit Insurance Corporation* v. *Farmers Bank of Newtown*, 180 S. W. 2d 532 (Mo. App.), involved a bank in which no question was made as to the proper closing. We submit, however, that the case is in conflict with *Federal Deposit Insurance Corporation* v. *Citizens State Bank of Niangua*, 130 F. 2d 102, l. c. 105, and with *State ex rel.* v. *Sevier*, 337 Mo. 1174, *supra*, and that the Circuit Court of Appeals was wrong in considering that the case expressed the Missouri law.

PRAYER.

For the foregoing reasons, your petitioners pray a Writ of Certiorari issue out of this Honorable Court to the United States Circuit Court of Appeals for the Eighth Circuit commanding it to certify and send to this court on a date to be designated a complete transcript of the record and the proceedings in the Circuit Court of Appeals had in this case, that this case may be reviewed and determined by this court; that the judgment of the Circuit Court of Appeals be quashed or reversed; and that your petitioners be granted such other and further relief as to this Honorable Court may seem meet and proper.

Dated June 5, 1946.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit in this case is reported in 153 F. 2d at Page 591 and appears on pages 88 to 98 of the transcript of the record filed herein.

JURISDICTION.

The jurisdiction of this Honorable Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A., Sec. 347 (a), and under Title 28, Sec. 377, U. S. C. A., and under Rule 38 of the Revised Rules of the Supreme Court of the United States.

The opinion and judgment of the Circuit Court of Appeals herein were filed on February 18, 1946 (R. 88-98). The Petitioners filed their Petition for a Rehearing on March 25, 1946 (R. 101-109), the time for filing same having been extended to that date by order of the Circuit Court of Appeals made March 4, 1946 (R. 99), which petition was denied April 2, 1946 (R. 111). On April 11, 1946, the Circuit Court of Appeals stayed the Mandate for sixty days pending Petitioner's application for Writ of Certiorari (R. 111).

SPECIFICATION OF ERRORS.

The United States Circuit Court of Appeals for the Eighth Circuit erred:

1. In assuming jurisdiction of the Appeal in this case.

2. In reversing the judgment of the District Court in this case.

3. In assuming jurisdiction and deciding the case on its merits and in remanding the case to the District Court with directions.

STATEMENT.

We believe we have made an adequate statement of this case in our Summary Statement in the foregoing petition. We, therefore, adopt that statement to avoid repetition.

In the brief following, we have not endeavored to discuss the questions submitted in our petition in the order in which they have been presented. We are not undertaking to discuss all of those questions, believing that we have suggested enough reasons and authorities in the reasons relied on for allowing the Writ, to suggest the worth of the issues presented in the Petition. We, therefore, make only a few suggestions and cite and discuss only a few authorities.

ARGUMENT.

POINT I.

The appeal in this case should have been direct to the United States Supreme Court. The Circuit Court of Appeals had no jurisdiction.

Respondent contended in its brief in the Circuit Court of Appeals that the FDIC was an agency of the United States. If this is true then the jurisdiction of the appeal was direct to the Supreme Court under Sec. 349a, Title 28, U. S. C. A.

Judge Otis held in the trial court that the provision of Sec. 264 (j-fourth), Title 12, U. S. C. A., "All suits of a civil nature at common law or in equity to which the corporation shall be a party shall be deemed to arise under the laws of the United States"—was unconstitutional where the Federal law was in nowise involved (See 55 Fed. Supp. 921).

Jurisdiction of the appeal from that decision could not be in two courts. If respondents are correct and the FDIC is an agency of the government then the appeal was direct to the Supreme Court under Sec. 349a, Title 28, U. S. C. A., *supra*. If that section applies then the Circuit Court of Appeals had no jurisdiction of the appeal in this case (*Hoffman* v. *McClelland*, 284 Fed. 837; *United States* v. *John*, 155 U. S. 109, 15 S. Ct. 39, 39 L. Ed. 87; *Great Northern Railroad* v. *Blaine County*, 252 Fed. 548), and its decision should be quashed. *Stratton* v. *St. Louis Southwestern Ry. Co.*, 51 S. Ct. 8, 282 U. S. 10, 75 L. Ed. 135.

POINT II.

The decision herein holding that the Federal Court has jurisdiction of this action is in violation of Section 2 of Article III of the United States Constitution, authorizing the Federal Courts and defining their jurisdiction.

Article III, Section 2, provides "The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority." No contention is made in this case of any ground of jurisdiction except that the case arises under the laws of the United States.

There is no constitutional provision and no statute giving Federal Courts jurisdiction of cases because a Federal Corporation is a party. That rule arises from Court decisions only. The parent case is *Osborn* v. *Bank*, 9 Wheat. 739. In the original cases the Federal laws were really and substantially involved but the jurisdiction was declared to arise because a corporation created by Federal law was a party. However, in time cases came into the Federal Courts where corporations organized under Federal laws where parties but no Federal question or issue under the Federal laws were in anywise involved. The United States Supreme Court then reconciled the language of the older cases in which it was stated that the jurisdiction vested solely by the fact that a Federal Corporation was a party to the suit and while they said that the old cases were not overruled (because in those cases a Federal question was actually involved) they did, however, go a step further and said that in addition to being a Federal Corporation a federal question must also be substantially involved as an essential element of the case. But in *Gully* v. *First National Bank*, 299 U. S. 109, 57 S.

Ct. 96, 81 L. Ed. 70, a national bank was a party and contended that such fact gave the Federal Courts jurisdiction, and this court said:

> "How and when a case arises 'under the Constitution or laws of the United States,' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action (Authorities). The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another (Citing authorities). A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto (Citing Authorities), and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal (Authorities). Indeed, the complaint itself will not avail as a basis of jurisdiction in so far as it goes beyond a statement of the plaintiff's cause of action and anticipates or replies to a probable defense (Authorities).
>
> Looking backward we can see that the early cases were less exacting than the recent ones in respect of some of these conditions. If a federal right was pleaded, the question was not always asked whether it was likely to be disputed. This is seen particularly in suits by or against a corporation deriving its charter from an Act of Congress (Citing *Osborn* v. *Bank*, 9 Wheat. 738; *Pac. R. R. Removal Cases*, 115 U. S. 1). Modern Statutes have greatly diminished the importance of those decisions by narrowing their scope (Authorities). Federal incorporation is now abolished as a ground of federal jurisdiction, except where the United States holds more than one-half of the stock. * * * Partly under the influence of statutes disclosing a new legislative policy, partly under the

> influence of more liberal decisions, the probable course of the trial, the real substance of a controversy, has taken on a new significance. 'A suit to enforce a right which takes its origin in the laws of the United States is not necessarily, or for that reason alone, one arising under those laws, for a suit does not so arise unless it really and substantially involves a dispute or controversy respecting the validity, construction or effect of such a law, upon the determination of which the result depends' (Authorities). Only recently we said after full consideration that the doctrine of the charter cases was to be treated as exceptional, though within their special field there was no thought to disturb them (Authorities). 'We should fly in the face of this legislative policy and disregard precedents which we think controlling were we to extend the doctrine now.' *Ibid.* Today, even more clearly than in the past, 'the federal nature of the right to be established is decisive—not the source of the authority to establish it.' *Ibid.*"

That statute, Sec. 42, Title 28, U. S. C. A., does not say that when the Federal Government owns more than half the stock, the Federal courts shall have jurisdiction in every case where that corporation is a party. It grants no jurisdiction whatever and under the United States Constitution (Section 2, Article III) the judicial power of the Federal government does not extend to any case that does not arise under the Federal laws, *i. e.*, in the absence of the other stated grounds of Federal jurisdiction, as in this case. Whether the Federal Court has jurisdiction in any case to which a Federal Corporation in which the United States owns more than half the stock, happens to be a party, must still be determined according to the law declared by the United States Supreme Court. *Gully* v. *First National Bank, supra,* is the last controlling decision of that court. It must now be determined as a fact that in addition

to the Federal incorporation and ownership of stock, "a right or immunity created by the constitution or laws of the United States, must be an element, and an essential one of the plaintiff's cause of action." Congress has no power to extend the judicial powers of the Federal Courts beyond the powers granted in the United States Constitution.

POINT III.

Sec. 41 (1), Title 28, U. S. C. A., gives the Federal Court jurisdiction, "Where the matter in controversy exceeds exclusive of interest and costs the sum of $3,000 and (a) arises under the constitution or laws of the United States or treaties made, or which shall be made under their authority.

The complaint shows that this is an action to recover interest only, which is claimed as due under the Missouri Law as compensation for non-payment of a certain principal amount, a judgment for which has already been recovered in the State Court and paid.

In *Fed. Dep. Ins. Corp.* v. *Citizens Bank,* 130 F. 2d 102, l. c. 105, the court held that the claim for interest now set up in the case at bar, was a claim for interest incident to the principal and could only be litigated and allowed in the court where the principal was allowed.

The prior Missouri decisions and the Federal decisions are in accord on the proposition that where interest does not arise by contract but accrues solely by statute as an incident to the non-payment of the principal a separate action cannot be maintained to recover the interest.

Arnold v. *Sedalia National Bank,* 74 S. W. 1038, 100 Mo. App. 474; *Stone* v. *Bennett,* 8 Mo. 42; *Graves* v. *Saline County, Illinois,* 104 Fed. 61; *Hammond* v. *Carthage Sul-*

phite Pulp and Paper Co., 34 F. 2d 157; *Stewart* v. *Barnes, Extr.*, 38 L. Ed. 781, 153 U. S. 456; *Pacific Railroad* v. *United States*, 158 U. S. 118, 15 S. Ct. 766, 39 Law Ed. 918; *United States* v. *Steinberg*, 100 F. 2d 124.

This rule was never departed from in Missouri until *Federal Deposit Insurance Corporation* v. *Farmers Bank of Newtown*, 180 S. W. 2d 532. This decision of the Kansas City Court of Appeals brushes aside the established Missouri law settled by controlling decisions of the Missouri Supreme Court without citing any authority therefor. The court says that the payment of the principal is a bar to recovery of the interest where the interest is not due by the terms of a contract but such rule has no application in bank insolvency proceedings; but it cites no competent Missouri authority for that statement.

In the old cases where interest was allowed in insolvency proceedings the interest was always contract interest that was accruing at the date of the insolvency. That rule has been extended in decisions allowing statutory interest accruing as a penalty for non-payment pending the court proceedings, but the point that the debtor's hands were tied by the law and the penalty cannot be assessed in such case was not raised, discussed or determined in any of the cases.

In *Kirrane* v. *Boone*, 66 S. W. 2d 861, 334 Mo. 558, the Supreme Court of Missouri declared that the Missouri statutes regulating bank liquidation proceedings provided an exclusive method of winding up the affairs of a subject bank. That special statute allows depositors no interest during the pendency of the liquidation proceedings but expressly limits the recovery, of the FDIC to the face amount of the dividends that would have been payable to the depositors, "until such dividends shall equal the insured deposit liability to such depositor."

See Sec. 8024 (16), R. S. Mo., 1939. Claims not filed are absolutely barred under the Supreme Court decisions. *Commerce Trust Company* v. *Farmers Exchange Bank,* 61 S. W. 2d 928; *Harney* v. *Peoples Bank,* 136 S. W. 2d 273 (Syl. 5).

Under the decisions of the Missouri Supreme Court the claim for interest is merged in the judgment for the principal which is *res adjudicata* as to the interest and the interest cannot afterwards be pleaded and set up as a separate claim because every judgment is *res judicata* not only as to all matters which were raised but as to all matters which might have been litigated in the former action.

Wickersham v. *Whedon,* 33 Mo. 561; *Powell* v. *Joplin,* 73 S. W. 2d 408, 335 Mo. 562; *Cordia* v. *Mathes,* 130 S. W. 2d 597, 344 Mo. 1059; *State ex rel.* v. *Hughes,* 148 S. W. 2d 576, 347 Mo. 549; *In re Orth's Estate,* 169 S. W. 2d 401, and cases cited; *Hunter* v. *Delta Realty Co.,* 169 S. W. 2d 936, 350 Mo. 1123.

See also *Baird* v. *United States,* 96 U. S. 430, 24 L. Ed. 703; *Gunter* v. *Atlantic Coast Line Railroad,* 200 U. S. 273, 50 L. Ed. 477, 26 S. Ct. 252; *Continental National Bank* v. *Holland Banking Company,* 66 F. 2d 823; *Kithcart* v. *Metropolitan Life Ins. Co.,* 119 F. 2d 497.

This rule was firmly established and strictly applied in Missouri both as to recovery of interest and as to bank liquidation proceedings. See *Broyles* v. *Achos,* 78 S. W. 2d 459 (Syl. 3), and *Citizens Security Bank of Englewood* v. *Gatewood,* 36 S. W. 2d 426; *Wickersham* v. *Whedon,* 33 Mo. 561.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its Supervisory powers in granting a Writ of Certiorari and thereafter reviewing and reversing the opinion and judgment of the United States Circuit Court of Appeals, Eighth Circuit.

Respectfully submitted,

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